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CASES:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 252

HARVEY LYLE ENTSMINGER,
Petitioner,

vs.

STATE OF IOWA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR RESPONDENT

OPINION BELOW

The decision of the Supreme Court of Iowa affirming the judgment of conviction against the petitioner is reported at 137 N.W.2d 381. The opinion will not be reported in the State official reporter, the "Iowa Reports."

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on October 19, 1965. The petition for a writ of certiorari was filed with this Court on December 13, 1965. 28 U.S.C. 1257(3), is the provision upon which the petitioner predicates jurisdiction for this Court's review.

QUESTIONS PRESENTED

1.

Where an indigent defendant desires appellate review of the merits of the proceedings culminating in his conviction and the appointment of counsel to assist him; and where the statutory procedures governing criminal appeals contemplate that plenary review can be obtained by filing a printed record and a brief on the merits; whether the defendant has been deprived of adequate appellate review where court appointed counsel, without the knowledge or consent of his client, failed to file the printed record or a brief on the merits, which failure resulted in appellate review only of the paper comprizing the clerk's transcript with an affirmance of the conviction thereon?

2.

Assuming an affirmative response to the first question, it becomes necessary to ascertain if the indigent defendant is eligible for and can obtain relief from this Court and, if so, the nature of the relief to which he is entitled?

3.

Assuming the Court can and should immediately reach the merits of the petitioner's search and seizure and self-incrimination contentions, the following question is further

presented: Where at the time an accused is booked on a forgery charge and his personal belongings, including papers written by him, are inventoried and placed in a custody locker for safekeeping, whether the papers written by him can constitutionally be used at the trial for handwriting identification purposes?

STATUTORY PROVISIONS AND PROCEDURAL RULES

The statutory provisions and procedural rules relevant to the respondent's Argument are set forth in the Appendix to this brief, pp. A1-A2.

STATEMENT

(Prefatory Comment)

The record (pp. 33-34), reflects that petitioner's counsel has lodged with the Clerk of this Court (1) a certified copy of the criminal trial transcript and (2) a certified copy of a transcript of the subsequent hearing on a motion for new trial and sentencing. These documents have been respectively designated by counsel as Exhibit "A" and Exhibit "B". Though these documents constitute the usual source for the preparation of the abstract of record for a criminal appeal to the Iowa Court, the content of neither was before that Court, in whole or in part, when it reviewed and affirmed petitioner's conviction. Accordingly, they are not, strictly speaking, a part of the record before this Court. We agree, however, that with respect to Exhibit "B" that transcript contains material relevant to petitioner's expressed desire to appeal the criminal judgment and for the appointment of counsel to assist him. We have no objection to counsel accurately referring to that transcript with respect to such matters and in our own Statement we shall, on occasion, allude to Exhibit "B" as a reference.

(The Facts)

On September 14, 1964, a county attorney's information was filed in the District Court of Iowa, Polk County, charging Harvey Lyle Entsminger with uttering a forged instrument in violation of Section 718.2 of the 1962 Code of Iowa (R. pp. 1-2). A plea of not guilty was recorded, trial commenced on October 2, 1964, and on October 6, 1964, the jury returned a conviction (R. pp. 15-17). Judgment and sentencing thereon was set for October 16, 1964 (R. p. 18).

Though the petitioner was represented at the trial by Everett Albers, an attorney from Des Moines, Iowa, three days subsequent to the verdict he requested the trial court to appoint other counsel to assist in preparing and filing a motion for new trial (R. pp. 15, 18, 19, 10). On October 16, judgment date, the court granted the request, appointed attorney Henry Wormley for such purpose, and adjourned until October 23, 1964, to allow new counsel time to prepare the mentioned motion (R. p. 19). The motion for new trial was filed on October 23, 1964, argued, and overruled (R. p. 20). Judgment was entered and the petitioner was sentenced to confinement in the State Penitentiary at Fort Madison, Iowa, for a term not to exceed ten years (R. pp. 20-21).

Immediately following entry of the judgment, the trial court advised Mr. Entsminger that he had the right to appeal the conviction and that in view of his indigency he was entitled to have counsel appointed to assist him, to which advice the petitioner responded "I do want to appeal this case" (Exhibit "B", pp. 31-32). Subsequent to an intervening colloquy of no relevance, he again voiced his desire to obtain appellate review and requested that Mr. Wormley be appointed to assist him (Exhibit "B", pp. 35-36). Counsel stated the appointment

was "all right" with him, whereupon the court granted the request and orally ordered the preparation, without cost, of a transcript of the trial proceedings (R. p. 20, Exhibit "B", p. 36). As reflected by the certificate appended to Exhibit "A", that transcript was completed on December 18, 1964, some 48 days after its preparation was ordered.

A timely and proper notice of appeal was filed by attorney Wormley on November 27, 1964, praying appellate review of the criminal judgment (R. p. 14). For the sake of clarity, it should be noted at this juncture that to secure plenary review of a conviction the Iowa provisions relative to criminal appellate procedure contemplate that within 90 days of the notice of appeal the printed abstract of record shall be prepared and filed with the Supreme Court of Iowa.

Subsequent to the date of the appeal notice, November 27, 1964, up to March 8, 1965, the record reveals no filings in the appeal. On the latter date, petitioner's counsel caused to be served on the Attorney General of Iowa and filed with the Clerk of Court a notice of intention to file the printed abstract and a brief on the merits (R. p. 25). When this notice was actually brought to the Iowa Court's attention, if ever, is not shown in the record; but on the day following its service on the Attorney General the Court took the appeal under submission on the so-called "clerk's transcript" (R. p. 26).[1] On March 11, 1965, the Chief Justice of the Iowa Court entered an order vacating such submission and directed that the petitioner be permitted to proceed with the appeal on the printed abstract and a brief on the merits (R. p. 26). From the date of this

1. The "clerk's transcript appeal" is a prime object of consideration in this action. To aid clarity in this factual statement it should be noted that the "clerk's transcript" is the equivalent of the "mandatory record" considered by this Court in *Griffin v. Illinois*, 351 U.S. 12, 13 note 2.

order, March 11, 1965, until September 21, 1965, the record reflects no further filing by counsel in the appeal. The appeal was again taken under consideration on a clerk's transcript on September 21, 1965, and on October 19, 1965, the Iowa Court entered a per curiam opinion affirming the conviction and judgment thereon (R. p. 33).

While such was the posture of the appeal insofar as appointed counsel was concerned, Mr. Entsminger on or about October 8, 1965, caused to be filed with the Iowa Court an application for a writ of certiorari (R. pp. 27-32). He alleged, inter alia, that court appointed counsel had informed him by letter of March 9, 1965, that when the record and brief were completed the same would be forwarded to him; that counsel again wrote on September 1, 1965, this time stating that nothing would be filed but the "record of the case"; and that in his opinion he was being denied effective assistance of counsel (R. pp. 28-29). Appended to the certiorari application were what purported to be representative copies of the letters above mentioned (R. pp. 30-32). The application for certiorari was summarily denied by the Iowa Court on October 18, 1965, one day prior to its per curiam affirmance of the conviction (R. p. 32).

Summary of Argument

I.

The record, which is not of our own making, reflects that the petitioner desired but did not obtain plenary review of the proceedings culminating in his conviction. In this respect, court appointed counsel, without the consent or knowledge of his indigent client, failed to file either the printed record or a brief on the merits with the result that the Iowa Supreme Court reviewed only the papers comprizing the clerk's transcript and affirmed the con-

viction thereon. We have conceded that ordinarily review of a clerk's transcript is not adequate and effective appellate review of the merits of the proceedings culminating in a conviction. We have concluded that in view of the instant record the petitioner is entitled to appropriate relief.

Though not necessary to the disposition of the case, we have set forth what we believe to be the proper obligation of court appointed counsel with respect to an indigent appellant and to the court. The Court has also been informed that the Attorney General has filed a petition with the Supreme Court of Iowa and attached proposed rule changes which, if adopted, would spell out appointed counsel's obligations in this respect.

II.

As the second portion of our Argument, we contend that the relief to which the petitioner is entitled is an appeal free of the constitutional defect present in the first appeal We ask the Court not to reach the issues proffered by the petitioner as to how the conviction is allegedly subject to reversal but rather to remand the case to the Iowa Supreme Court with appropriate directions.

III.

In the final Division of our Argument, we argue that should the Court reach the merits of the petitioner's search and seizure and self-incrimination contentions, the trial record and the case law with respect thereto reflects numerous reasons as to why the search and seizure and self-incrimination contentions are without merit. In this respect, our main argument is that there was no search and seizure in the constitutional sense and that the papers taken into custody at the time the petitioner was booked at the jail could subsequently be used at his trial for handwriting comparison purposes.

ARGUMENT

I.

An Indigent Defendant Desiring Review of a Criminal Judgment Is Constitutionally Entitled to Adequate and Effective Appellate Review Despite His Poverty. In This Respect, a Convicted Indigent Has Not Received Adequate Appellate Review on a Record Disclosing That Court Appointed Counsel, Without the Consent or Knowledge of His Client, Took No Action to Secure Plenary Review with the Result That the Conviction Was Affirmed Solely on the Basis of a Clerk's Transcript. Accordingly, the Indigent Defendant Is Entitled to Relief, the Nature of Which Is Considered in Division II of This Argument.

The instant case presents the continuing problem of what is constitutionally required of a state in administering its criminal appellate procedure with respect to convicted indigents desiring appellate review. The most logical approach to this problem is to first consider the relevant principles established by this Court, after which we shall focus attention on the Iowa scheme of criminal appellate procedure and how it afected the petitioner at bar

What Is Constitutionally Required:

Some ten years ago this Court decided *Griffin* v *Illinois,* 351 U.S. 12, a case presenting the issue of whether Illinois was constitutionally required to furnish, without cost, a copy of the trial transcript to convicted indigents seeking appellate review of their convictions. The Illinois Attorney General conceded that the indigents "needed a transcript to get adequate appellate review of their alleged trial errors but argued that the denial of a free transcript did not violate either the Due Process or Equal Protection clause of the FourteenthAmendment (351 U.S. at 16).

A majority of the Court expressed the opinion that where a state provides a scheme for direct review of criminal judgments it cannot, consistent with the Fourteenth Amendment, deny an indigent defendant adequate and effective appellate review because of the inability to purchase a trial transcript. In the words of Mr. Justice Black announcing the Court's judgment, "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts" (351 U.S. at 19).[2]

The issue of "adequate appellate review" despite poverty was subsequently considered in the following cases arising from state courts: *Eskridge* v. *Washington State Board*, 357 U.S. 214; *Burns* v. *Ohio*, 360 U.S. 252; *Lane* v. *Brown*, 372 U.S. 477; *Draper* v. *Washington*, 372 U.S. 487; *Douglas* v. *California*, 372 U.S. 353; *Long* v. *Iowa*, 35 Law Week 4046 (decided December 5, 1966). See also *Smith* v. *Bennett*, 365 U.S. 708. Though certain of these decisions reflect that sometimes there is a lack of agreement

2. Technically, there was no opinion of the Court in *Griffin*. Mr. Justice Black announced the Court's judgment and filed an opinion concurred in by Chief Justice Warren and Justices Clark and Douglas. Mr. Justice Frankfurter wrote a special concurring opinion. Mr. Justice Harlan in a dissenting opinion on the merits contended that neither the Due Process nor Equal Protection clauses required the result reached by the other five Justices. Subsequent decisions seemingly demonstrate, however, that a substantial majority of the Court, if not the entire Court, is now committed to the *Griffin* proposition of adequate appellate review despite poverty. Thus, in *Lane* v. *Brown*, 372 U.S. 477, Mr. Justice Stewart, in speaking for Chief Justice Warren and Justices Black, Douglas, Brennan, White and Goldberg restated as the holding of *Griffin* substantially the proposition set forth in the text. In *Douglas* v. *California*, 372 U.S. 353, decided the same day as *Lane* v. *Brown*, Mr. Justice Clark expressly said that he adheres to his vote in *Griffin* (372 U.S. at 358), and Mr. Justice Harlan wrote that in so far "as the result in [*Griffin*] rested on due process grounds, I fully accept the authority of Griffin" (372 U.S. at 361, note 1). *Long* v. *Iowa*, 35 Law Week 4046 (decided December 5, 1966), presents the most recent case where a unanimous Court is seemingly committed to the proposition announced by Mr. Justice Black.

as to what constitutes "adequate appellate review," e.g., *Draper* v. *Washington* and *Douglas* v. *California*, it appears from a careful reading of the same that the Court is united in its commitment to the following proposition:

> Where a state provides an appellate scheme for reviewing criminal judgments and where a convicted indigent desires to appeal the judgment against him, the state is constitutionally required to afford him full and effective appellate review despite his poverty.

This principle means that if a convicted indigent needs a trial transcript to obtain adequate review it must be furnished to him without cost unless the state provides alternative methods for obtaining such review where a transcript is not necessary, *Griffin* v. *Illinois*, supra; *Lane* v. *Brown*, supra; *Long* v. *Iowa*, supra. Moreover, the majority opinion in *Douglas* v. *California*, supra, reflects the thinking of six members of the Court that the assistance of counsel may well be necessary to assure adequate appellate review. Accordingly, the indigent defendant seeking an appeal is entitled, if he so desires, to the appointment of counsel to assist him, and we suppose it is self-evident that "assistance" means "assistance." Indeed, this Court in speaking in the federal realm has stated that an indigent appellant is entitled to "adequate representation by counsel" and that representation as an amici curiae is not adequate but rather "representation . . . [as] an advocate is required," *Ellis* v. *United States*, 356 U.S. 647, 675.

As a corollary to the constitutional axiom of adequate appellate review despite poverty, the convicted indigent desiring an appeal cannot constitutionally be denied access to review by duress, coercion, fraud or by any other act or failure to act upon the part of the state, *Dowd* v. *United*

States, 340 U.S. 206, 209; *Ford* v. *State*, 138 N.W.2d 116, 119 (Iowa, 1965). Nor may an attorney whose responsibility it is to represent convicted indigents on appeal refuse to take any action in connection therewith and thereby "take from an indigent all hope of any appeal at all." *Lane* v. *Brown*, supra, at 485

What Iowa Provides:

One convicted of a public offense in Iowa can, as of right, appeal the conviction to the Iowa Supreme Court, Section 793.1 of the 1966 Code of Iowa;[3] *Weaver* v. *Herrick*, 140 N.W.2d 178, 180 (Iowa, 1966). A proper notice of appeal served as designated within 60 days of final judgment confers jurisdiction on the Iowa Court to entertain the appeal, Sections 793.2 and 793.4 of the Code. Once the appeal is perfected, the defendant, if indigent, is entitled to and can obtain a copy of the trial transcript at the expense of the appropriate county, Section 793.8 of the Code; *Weaver* v. *Herrick*, supra, at 182.

While an indigent defendant has long had the right to court appointed counsel relative to the prosecution,[4] there has not been nor is there any statutory provision in Iowa specifically requiring the appointment of an attorney to assist in an appeal. Prior to *Douglas* v. *California*, however,

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3. At the time the petitioner was charged, convicted, and perfected his appeal the 1962 Code of Iowa was in effect. The provisions of criminal appellate procedure to be considered in the text, except where otherwise indicated, have remained unchanged, are now found in the 1966 Code of Iowa, and it is that Code which is referred to for convenience.

4. Section 775.4 of the 1962 Code of Iowa, the exact language of which has been in existence for many years, read as follows at the time the petitioner was informed against:

> "Right to counsel. If the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two. . . ."

an indigent desiring an appeal could usually obtain such assistance, and since *Douglas* the Iowa Court via case law has recognized that the indigent is entitled to appointed counsel for the appeal, *Schmidt* v. *Uhlenhopp*, 140 N.W.2d 118, 120 (Iowa, 1966); *Weaver* v. *Herrick*, supra. An attorney so appointed is not expected to serve gratuitously but is entitled to be compensated, Section 775.5 of the 1966 Code of Iowa; *State* v. *Griffin*, 135 N.W.2d 77, 80 (Iowa, 1965); *Schmidt* v. *Uhlenhopp*, supra, at 172.

Once an appeal has been perfected, Section 793.17 of the Iowa Code directs that the "record and case may be presented in the supreme court by printed abstracts [and] arguments . . . as provided by *its rules*" (emphasis added). In this respect, Supreme Court Rule 16 (1966 Code, Vol. 2, pp. 3004-3005, see Appendix, infra, pp. A1-A2), outlines the procedure by which a criminal appeal can be brought before the Iowa Court for plenary review of the record and a brief on the merits with oral argument if that is desired.

In general terms, Rule 16 contemplates that within 90 days of the notice of appeal the appellant shall file the printed abstract of record, i.e., an abstract of the trial transcript as believed relevant to the appeal. Following such filing, the Rule directs that the appellant shall have 45 days within which to file a brief on the merits, after which the Attorney General shall respond to the printed record and the brief in the manner prescribed by the Rule. Supreme Court Rule 18, 1966 Code, p. 3305, specifies that the printing, form, content, and required number of copies of the abstract and brief shall otherwise be governed by the Iowa Rules of Civil Procedure. See generally Division XVI of the Rules of Civil Procedure, 1966 Code, Vol. 2, pp. 2980-2987. Furthermore, since July 4, 1965, the effective date of Chapter 449 of the Acts of the 61st

General Assembly, codified in Section 775.5 of the 1966 Code, Iowa law specifically provides for the printing of the record and brief on the merits without cost to an indigent criminal appellant.[5]

The alternative to plenary consideration of the appeal is review solely on the clerk's transcript as provided for by Supreme Court Rule 15, the text of which is set out in the margin.[6] Such review, as a practical matter, results from the failure to file the printed abstract of record within the time provided for in Supreme Court Rule 16. The content of the clerk's transcript is governed by Section 793.6 of the Code which enjoins the clerk of the trial court, when an appeal is taken, to:

> "Promptly prepare and transmit to the clerk of the supreme court a transcript of all record entries in the cause, together with copies of all papers in the case on file in his office . . . all duly certified under the seal of his court."

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5. Section 775.5 of the Code provides that "An attorney appointed by the court . . . shall be entitled to a reasonable compensation . . . and in the event of appeal the cost of obtaining the transcript of the trial and the printing of the trial record and necessary briefs in behalf of the defendant." Prior to the enactment of this statute such printing costs were generally allowed, though the District Court of Iowa, Polk County, the trial court involved here, took the position that it must allow an indigent defendant a free trial transcript but would, on occasion, refuse to order the county to pay for the printing of the abstract and brief. This factor in at least two cases known to this writer caused appointed counsel to request the Iowa Court to permit the filing of the trial transcript in lieu of filing the requisite number of printed copies of the abstract of record. Such permission was granted and plenary review obtained on the full record. As noted in the text, Section 775.5 as it reads now became effective on July 4, 1965. The Iowa Court did not take this case under submission on a clerk's transcript until September 21, 1965.

6. "Court Rule 15. When an appeal is taken in a criminal case and the clerk's transcript of the record, required by section 793.6 of the Code, is filed with the clerk of this court, the cause shall be assigned for submission on such transcript, but the date set for such submission shall be not less than ninety days after the date the appeal was perfected as shown by such transcript." (1966 Code, Vol. 2, p. 3004).

The "transcript" referred to in the statute is the equivalent to the "mandatory record" considered by this Court in *Griffin* v. *Illinois*, 351 U.S. 12, 13, note 2, and ordinarily consists of a copy of the indictment or information, arraignment, plea, verdict, sentence, and sometimes the court's charge to the jury. In the instant case, the clerk's transcript (R. p. 12) also contains a copy of the "motion for a New Trial," though in this writer's experience the inclusion of such a motion is not a practice consistently followed by the clerks of the various trial courts in Iowa. The shorthand report of the trial proceedings is not one of the "papers . . . on file in [the clerk's] office" and, accordingly, the trial transcript is not a part of the clerk's record certified up to the Iowa Court.

What the Petitioner Received:

From the above discussion of criminal review procedure, it is clear that Iowa law provides an appellate scheme whereby an indigent defendant can obtain adequate appellate review of the merits of the proceedings leading to his conviction. The petitioner complains, however, that the system can operate, and did so in his case, to allow appointed counsel the unreviewable discretion to decide not to seek meaningful review. He contends that appointed counsel, without his consent or knowledge, declined to submit the appeal on a printed abstract with a brief on the merits, but rather permitted the conviction to be affirmed on the clerk's transcript. In responding to these arguments we are saddled with a record not of our own making.

The record reflects that petitioner, an indigent, desired to appeal his conviction, requested that counsel be appointed to that end, and caused a notice of appeal to be filed (R. pp. 20, 14; Exhibit "B", pp. 31, 35-36). The printed abstract of record was not filed within the 90 days allowed by Rule 16 and on March 9, 1965, the Iowa Court took the

appeal under submission on the clerk's transcript (R. p. 26).[7] On March 8, 1965, appointed counsel did file and caused to be served on the Attorney General his notice of intention to submit the appeal on a printed abstract and brief (R. p. 25), and this factor was seemingly brought to the Iowa Court's attention and resulted in that Court entering the following order on March 11, 1965:

> "Submission of the appeal . . . on clerk's transcript is hereby set aside . . . and it is ordered that the appeal be submitted on printed abstract [and] briefs and argument . . ." (R. p. 26).

Nothing further was apparently filed by appointed counsel in the appeal; the case was again submitted on a clerk's transcript on September 21, 1965; and on October 19, 1965, Entsminger's conviction was affirmed on the basis of that transcript (R. p. 33).

Predicated on the record before us, we cannot in fairness to the petitioner, discover any argument that he desired less than plenary review of the merits of his conviction. Moreover, it would hardly be candid to suggest that prior to the affirmance on the clerk's transcript Entsminger relinquished the desire for full plenary review or, insofar as the record is concerned, that he was materially responsible for not receiving such review. The pleading filed with the Iowa Court dated October 8, 1965, some 11 days before the conviction was affirmed, contained allegations relative to the manner in which the petitioner believed counsel was handling the appeal (R. pp. 27-29). The letters of appointed counsel attached to that pleading, one of March 9, 1965, and the other of September 1, 1965, seemingly respond to complaints by Entsminger relating

7. There is nothing in the Iowa Supreme Court file relative to *State* v. *Entsminger* showing that prior to March 9, 1965, the petitioner ever sought or obtained an extension of time within which to file the printed abstract.

to the progress of the appeal (R. pp. 30-32). The content of the mentioned letters were such as to reasonably lead the petitioner to suppose that at least a printed abstract, if not a brief on the merits, would be filed. See also the correspondence set forth in the petitioner's brief, Appendix, pp. 53-57.

Such being the posture of the case, the question presented is whether this convicted indigent received adequate appellate review and, if not, whether he is entitled to and can receive relief from this Court. We are forced to conclude that the decisions of this Court, in particular that of *Lane* v. *Brown*, 372 U.S. 477, suggest a negative answer to the first portion of the question and an affirmative one as to the second part.

Brown was convicted of murder in Indiana and sentenced to death. On appeal the conviction was affirmed and his subsequent petition for a writ of error coram nobis was denied by the state trial court. Indiana permitted an appeal from such denial but also required that the coram nobis transcript be filed in such an appeal before jurisdiction attached. In this respect, under Indiana's public defender act of 1945, only the public defender, in his discretion, could order a transcript of the coram nobis hearing for an indigent's appeal and this the public defender refused to do for Brown. Thus, Brown was denied any appeal at all from the lower court's denial of his coram nobis petition. The Court was unanimous in its judgment that Indiana's procedure violated the Fourteenth Amendment. In delivering the opinion of the Court, Mr. Justice Stewart pointed out that *Griffin* v. *Illinois* "held that a State with an appellate system which made available transcripts to those who could afford them was constitutionally required to provide 'means of affording adequate and effective appellate review to indigent defendants' " (372 U.S. at 482). The

Court concluded that the Indiana scheme for obtaining appellate review conferred upon a state officer outside the judicial system "power to take from an indigent all hope of any appeal at all" and that such was not constitutionally permissible. The case was remanded with directions that Brown be discharged "unless within a reasonable time the State of Indiana provides him an appeal on the merits to the Supreme Court of Indiana" (372 U.S. 485).

Apart from the fact that this case deals with a direct criminal appeal, it is distinguishable from *Lane* v. *Brown* in that the petitioner received review on a clerk's transcript and his appointed attorney was not, strictly speaking, a "state officer". We suppose, however, that these distinctions are constitutionally irrelevant if the petitioner was deprived of adequate and effective appellate review of the merits of his conviction. In this respect, it must be admitted that in the usual case review on the clerk's transcript can hardly be labeled adequate and effective review of the merits of the proceedings culminating in the conviction.[8] As noted above the transcript usually contains little more than a copy of the indictment or information, arraignment, plea, verdict, sentence, and sometimes the court's charge to the jury. Indeed, the Iowa Court has recently stated that "[To] afford an indigent defendant an adequate appeal from his conviction, the furnishing of a transcript, printed record and necessary briefs is required." *Weaver* v. *Herrick*, 140 N.W.2d 178, 181 (Iowa, 1966). Moreover, the petitioner was constitutionally entitled to the appointment of counsel to assist him, *Douglas* v. *California*, 372

8. There are situations where review on a clerk's transcript may produce results favorable to the defendant. Thus, if the transcript contains, as it sometimes does, the lower court's instructions review might be meaningful. To illustrate, an instruction regarding the defendant's failure to testify could result in a reversal, *Griffin* v. *California*, 380 U.S. 609; *State* v. *Johnson*, 138 N.W.2d 518 (Iowa, 1965).

U.S. 353. He had appointed counsel but for reasons not shown of record, counsel gave no assistance; he was, for all practicable purposes, "without benefit of counsel" within the spirit of Douglas, which fact resulted in the merits of the one and only appeal he had of right not being decided. This is not to say that the failure to obtain review of the merits resulted from any inaction on behalf of the Iowa Court; rather it resulted from a scheme which, at least on this record, permitted a court appointed attorney to take no action with respect to an appeal and to so do without consultation with anyone.

In exercising what we would like to believe is considerable circumspection, we have concluded from the record that the petitioner desired but did not obtain the plenary review which was his due, and in keeping with this court's decisions considered above, we must concede that he is entitled to relief, the nature of such relief being a subject for consideration in Division II of our Argument. First, however, we feel obligated to comment upon the clerk's transcript procedure and the responsibility of appointed counsel to an indigent client and to the court.

The petitioner (Brief, pp. 19, 25-26), characterizes the clerk's transcript appeal as a "white wash" and suggests the system is per se unconstitutional. These observations are, we think, too extreme. The General Assembly or the Iowa Court could enact a provision whereby an appeal would be dismissed on the Court's own motion if the printed abstract was not filed on time. The Rule 15 procedure essentially serves the same function but with the additional factor that the Court reviews the clerk's transcript for plain errors, if any, showing on its face. It is common knowledge in Iowa among lawyers, and this writer knows from personal experiences, that some appeals are

noted solely to permit the convicted defendant time to put his affairs in order. There have also been instances where having been advised as to the lack of merit to an appeal the defendant consented to proceed no further. Moreover, counsel to aid the indigent is appointed by the trial court and where a case comes up on a clerk's transcript the Iowa Court is usually not aware if the appeal involves an indigent. In this respect, where the Iowa Court has received a timely complaint expressing dissatisfaction with a submission on a clerk's transcript it has not hesitated to set aside the submission and allow the appeal to proceed on a printed record and brief; such, it will be recalled, happened here the first time the printed abstract was not filed in time (R. p. 26). And where the Iowa Court has affirmed a conviction on a clerk's transcript it is not impossible to get the Court to vacate the judgment and to allow the indigent plenary review. Compare *State* v. *Davis,* 130 N.W.2d 591 (affirmed on clerk's transcript, October 24, 1964) with *State* v. *Davis,* 140 N.W.2d 925 (Iowa, 1966).

With these considerations in mind, we think it not fair to label the clerk's transcript appeal a "white wash" or to state that the procedure is per se unconstitutional. As we have noted, the real problem with the clerk's transcript system is that it can permit appointed counsel, for whatever reason, to take no significant action in the appeal and to so do without the knowledge or consent of either the indigent appellant or the court. Though we shall presently consider what we believe to be the nature of appointed counsel's obligation to his client and to the court, it is obvious from this Court's decisions that such inaction made possible by the system and culminating in the lack of meaningful review is not permissible, cf. *Lane* v. *Brown,* supra;

Douglas v. *California*, supra; *Ellis* v. *United States*, 356 U.S. 674.[9]

Though such is not necessary to the disposition of this case, we think it appropriate for the State to set forth what it believes to be the responsibility of counsel appointed to assist an indigent on appeal. *Johnson* v. *United States*, 352 U.S. 565, which has been characterized as the federal counterpart of *Douglas* v. *California*, requires the appointment of counsel for an indigent seeking review of a federal conviction. The right having been established, *Ellis* v. *United States*, 356 U.S. 674, holds that the indigent is entitled to representation as an advocate. In that case, the Court concluded that counsel representing the petitioner in the Court of Appeals had performed essentially the role of amici curiae. *Ellis* does not, however, stand for the proposition that, once appointed, counsel must compromise his convictions and carry the appeal to completion even though he justifiably believes the appeal is frivolous. This Court in examining the role of appointed counsel stated (365 U.S. at 675):

> "If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may seek to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed."

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9. In some respects, Entsminger was, from an appellate standpoint, less fortunate than the petitioners in *Douglas* v. *California*. Not only was he without the assistance of counsel but he also did not "receive the benefit of expert . . . appraisal of the merits of his case on the basis of the trial record." 372 U.S. 353, 365 (Harlan, J., dissenting). Nor was he, at least on the record before us, advised that the appeal would not be prosecuted because it lacked merit, *Lane* v. *Brown*, 372 U.S. 477, 481-482, note 10.

The United States Court of Appeals for the District of Columbia, pursuant to the *Ellis* decision, has established guidelines for appointed counsel who after making a "conscientious investigation" concludes an appeal is frivolous, *Johnson* v. *United States*, 360 F.2d 844 (C.A.D.C.); *Tate* v. *United States*, 359 F.2d 245 (C.A.D.C.). That Court's instructions, embodied in a Statement dated December 13, 1963, notes that the Court "will be greatly aided if, as a general rule, appointed counsel remains in a case." Recognizing that counsel may justifiably desire to withdraw because of frivolity, the Court conditions such withdrawal on the requirement that he:

> "file a supporting memorandum analyzing the case legally, citing record references to the transcript . . . and also citing any case or cases upon which counsel relied in arriving at his . . . conclusion of [frivolity]" (*Johnson* v. *United States*, at 844-845).

The memorandum is confidential, is not placed in the public files, and is not served on the government, so as to not prejudice the indigent's case if the Court concludes the appeal is not frivolous.

Ellis, Johnson and *Tate* are concerned with federal appeals and it is not clear as to what extent, if any, the principles articulated in those decisions are constitutionally compelled. One thing is clear, however, a convicted indigent desiring an appeal is entitled to the assistance of counsel and this means adequate representation in the role of an *advocate*. Counsel's function on appeal is to point to trial errors, if such there be, and expound the applicable rules of law. In executing this function we think that it

is neither required nor warranted that he advance absurd or legally frivolous contentions.[10]

Thus, in our opinion, if counsel, after conscientious investigation, is convinced that the appeal is frivolous he should be allowed to ask to withdraw, though it should be made plain that as a general rule the appellate court does not favor such requests and would be greatly aided if appointed counsel remains in the case.[11] Prior to any request to withdraw, it seems obvious that counsel should advise the indigent client of the decision as to frivolity and if the client upon being so advised agrees with counsel's decision and desires to proceed no further with the appeal, such desire clearly and expressly communicated to the appellate court should end the problem and result in a dismissal of the appeal.

We cannot, however, agree that the request to withdraw should be conditioned on a requirement that appointed counsel file a memorandum of the kind presently used in the District of Columbia Circuit. The content of such memorandum as described in *Johnson* v. *United States*, supra, is in reality a brief arguing as to how the record shows that the indigent is not entitled to relief, with citations to prove the point. We are skeptical of this procedure because it not only removes appointed counsel from the

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10. Section 610.14 of the 1966 Code of Iowa provides that it is the duty of an attorney ". . . To counsel or maintain no other actions, proceedings, or defenses than those which appear to him legal and just, except the defense of a person charged with a public offense." While we are not certain as to the precise meaning of the proviso to this statute, we are sure that it does not require an appointed appellate attorney to compromise his convictions and press upon the court frivolous arguments.

11. Judge Burger's concurring opinion in *Johnson* v. *United States*, supra, presents a highly cogent thesis as to how court appointed counsel can perform an important function to his client and to the court as an advocate in the appeal even though he believes his "client's cause . . . is well nigh hopeless," 360 F.2d at 846-847.

role of an advocate but it also, at the very least, casts him in the role of amici curiae, and some would say it makes him *adverse* to his client, *Cruz* v. *Patterson*, 253 F. Supp. 805, 808 (D. Colo.), affirmed 363 F.2d 879 (C.A. 10); cf. *Douglas* v. *California*, 372 U.S. 353, 358.

We think that if counsel, after conscientiously reviewing the trial transcript, concludes that the appeal is so lacking in merit that he cannot justly associate himself with it and if he informs his client of this decision, then all that should ethically be required is that he advise the trial court, not the appellate court, that since his appointment by that court his relationship with respect to the appeal has developed to the point that he can no longer in good faith act in the best interest of his client. Should the court press counsel for further elaboration the most that should be required is that counsel state that he has thoroughly examined the trial transcript; that in his professional opinion the defendant has no meritorious appeal; and that he cannot in good conscience continue as an advocate. It is contemplated that a court will rarely compel any lawyer, by judicial order, to act contrary to conscience, *Johnson* v. *United States*, 360 F.2d at 847, but should the court refuse permission to withdraw counsel should file a printed record and a brief informing the appellate court of the points his client urges and otherwise see that the case is reviewed in accordance with "a set of rules which have evolved from centuries of experience and which are still being changed," *Johnson* v. *United States*, supra at 847.

Where counsel is permitted to withdraw, such results because of the nature of his ethical obligation relative to an appeal and that aspect of the problem must be separated from the indigent defendant's right to plenary review of his conviction. In this respect, a majority of this

Court is committed to the proposition that according plenary review contemplates the assistance of counsel and, accordingly, if the indigent desires to proceed with the appeal further counsel should be secured by the trial court to assist him.[12]

It should be of interest to the Court that the Attorney General has drafted proposed rule changes which would do away with the clerk's transcript appeal and spell out the role of counsel appointed to assist an indigent seeking review of a conviction. We have petitioned the Iowa Supreme Court to adopt the proposed rules and the Court has assured us that it will carefully consider the same. A copy of the petition and a copy of the proposed rules are set forth in our appendix, infra, pp. A2-A6.

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12. Respecting the observation as to a second appointment of counsel, some will immediately cry "Pandora's box." Though we doubt that such apprehension is relevant to any endeavor to delineate the obligation of a court appointed attorney, we think the fear is groundless. With the rich and poor alike there will come a time that the failure to secure an attorney to champion a frivolous appeal will be grounds enough for the appellate court to dispose of the matter on the trial transcript and any briefs that may be filed pro se. Such would not deny the rich due process nor would it work an invidious discrimination against the poor, because the State will have done all that could reasonably be required of it. Moreover, we do not think it is necessary to attempt to isolate when that time will have arrived. There will be very few appeals that are so patently frivolous that appointed counsel will refuse to associate himself with the same and of that number the chances of further counsel desiring to withdraw is probably negligible.

II.

Where the Appellate Process Has Been Constitutionally Defective, As for Example Where the Defendant Has Been Deprived of Adequate Appellate Review, the Relief to Which the Defendant-Appellant Is Entitled Is an Appeal Free of the Constitutional Defect. In This Respect, the Supreme Court of the United States Should Not, Even Though It Has the Trial Record Before It, Reach the Merits of the Proceedings Leading to the Defendant's Conviction.

Though the trial transcript was not before the Iowa Court when it affirmed Entsminger's conviction on the clerk's transcript, counsel appointed by this Court has lodged the same with the Court, designating it as Exhibit "A". Predicated on the content of that transcript, the petitioner argues, Brief, Division III, that he was denied due process of law during the proceedings culminating in the conviction, in that personal papers were seized from his person, without consent, and the same were used at the trial for handwriting comparison purposes, all in violation of his right to privacy and of his privilege to be free from compulsory self-incrimination. In this respect, the Court is asked to immediately reach the merits of the Fourth and Fifth Amendment argument and to reverse the conviction and remand for a new trial, even though the Iowa Court has not, in fact, passed on the same.

Apart from the fact that the trial transcript was not of record below and, thus, not of record here, there is yet another reason why the relief prayed for is not appropriate. Where the appellate process has been constitutionally defective, as for example where a defendant has been deprived adequate appellate review, the decisions of this Court clearly indicate that the relief to which such an appellant is entitled is an appeal free of the constitutional defect. *Douglas* v. *California,* is the first case in point.

Having been convicted in the trial court, petitioners Douglas and Meyers appealed as of right to the California District Court of Appeals. That court denied their request for appointment of counsel after "having gone through the *record*" (Emphasis added), and affirmed the convictions (372 U.S. at 354-355). A majority of the Court held that an indigent has been deprived of a constitutional right "where the merits of the one and only appeal [he] has as of right are decided without benefit of counsel" (372 U.S. at 357). In light of this holding, the judgment of the District Court of Appeals was vacated and the case remanded "*to that court* for proceedings not inconsistent with this opinion" (372 U.S. at 358, Emphasis added). The trial transcript was a part of the record before the Court in *Douglas* and the petitioners seemingly asked the Court to review their complaints relative to an alleged denial of fair trial (372 U.S. at 367, note 4). The Court did not reach the merits of the conviction and its mandate to the intermediate appellate court clearly contemplated only an appeal on the merits with counsel to assist the petitioners. The major difference between *Douglas* and the instant case is that the California appellate court had the trial record before it, had "gone through" such record, and affirmed the convictions on the basis of that record. The Iowa Court did not have the trial record, a factor that makes this case an even more inappropriate vehicle with respect to the petitioner's request that the Court immediately reach the merits of his conviction.

With respect to other state cases having some relevance to our contention that the Court should not now reach the merits of the petitioner's Fourth and Fifth Amendment contentions, see *Cochran* v. *Kansas*, 316 U.S. 255 (trial record before the Court); *Dowd* v. *Cook*, 340 U.S. 206; *Draper* v. *Washington*, 372 U.S. 487.

Coppedge v. *United States*, 369 U.S. 438, though a federal case, is very much in point. Coppedge, having been convicted in the District of Columbia, sought leave of the trial court to appeal in forma pauperis and such request was denied. An application for leave to so appeal was then filed with the Court of Appeals; counsel was appointed to assist the petitioner; a transcript of the trial was prepared at government expense; and counsel filed a 30 page memorandum in support of the petition for leave to appeal. The Court of Appeals denied leave to appeal in forma pauperis. This Court, noting at some length the delay that had occurred between the petitioner's original conviction and his attempt to obtain appellate review, stated as follows (369 U.S. at 452-453):

> "In the light of this delay, it is not surprising that petitioner asks us to reach the merits of his case immediately. However, delay alone, unfortunate though it is, is not sufficient cause to bypass the orderly processes of judicial review. Contrary to the Government's assertion here that petitioner has already received what amounts to plenary review of the conviction following his second trial, we hold petitioner has not yet received the benefits of presenting either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court."

Apart from these decisions, it should be noted that in asking the Court to reach the merits of his conviction the petitioner has taken considerable liberty with the trial transcript in an endeavor to show that he was subjected to an illegal search and seizure and compelled to incriminate himself. Without conceding that the transcript is of record before this Court, as we read our copy it is by no means clear that he didn't consent to the use of the papers in issue or that he raised timely and appropriate objections on Fourth and Fifth Amendment grounds (Exhibit

"A", pp. 48-49, 112-113). Indeed, that record is void of any objection relative to compulsory self-incrimination, cf. *Henry* v. *Mississippi*, 379 U.S. 443; *Schmerber* v. *California*, 16 L. Ed. 2d 908, 916, note 9. These are issues showing on the face of the trial transcript and are of such a nature that this Court should not be asked to pass on them in the first instance.

The Iowa Supreme Court has recently ruled that it has jurisdiction to entertain a delayed appeal where there has been a "denial of a constitutional right in the appellate process," *Ford* v. *State*, 138 N.W.2d 116, 119 (Iowa, 1965). We have conceded that the petitioner sought but did not obtain meaningful review of his conviction because of inaction of court appointed counsel. Accordingly, we think the relief to which he is entitled is to have the case remanded to the Iowa Supreme Court for further proceedings not inconsistent with the Court's decision.

III.

Assuming It Is Proper for the Court to Reach the Petitioner's Fourth and Fifth Amendment Issues, the Trial Record and the Case Law with Respect Thereto Reflects Numerous Reasons As to Why the Petitioner's Search and Seizure and Self-Incrimination Contentions Are Without Merit.

While we do not believe the Court should reach the search and seizure and self-incrimination issues, we shall, out of an abundance of caution, consider the same. We accept the petitioner's assertion (brief p. 39) that at the time of his arrest his belongings, among which were papers written by him, were "taken away . . . and placed for safekeeping purposes in a safe." The search and seizure and self-incrimination issues will be separately considered.

Search and Seizure

Carroll Dawson, a Des Moines, Iowa police lieutenant with expertise in handwriting examination, identified several state exhibits as papers which were in the petitioner's possession when he was being booked on the forgery charge (Exhibit "A", pp. 44-48). Lt. Lawson testified that he removed certain of these papers at that time (Exhibit "A", p. 44), and in answer to a question on direct as to who wrote them the following colloquy transpired (Exhibit "A", pp. 48-49):

"Q. Did you have a conversation with Mr. Entsminger on that date?

"A. Yes, sir, I did.

"Q. Will you tell us what the conversation consisted of?

* *

"A. Mr. Entsminger had these papers on him when he was being booked in the jail that day, and I looked at them and asked Mr. Entsminger if he had written these himself.

"Q. What did he say?

"A. I asked him twice, in fact, because I wanted to know for sure that he had written them himself in long hand, and his answer was that he had written them.

"Q. State whether or not you had any further conversation about taking them from him at that time.

"A. Well, Mr. Entsminger refused to give us a sample of his writing, the usual sample we take in check cases, and consequently that is why I was interested in these. And when I told him that the County Attorney advised that we could hold these for evidence he said that would be all right, he would write some more the next day."

There was no objection to the above identification of the petitioner's papers; nor any objection on Fourth Amendment grounds to the above testimony. In this respect, the petitioner did not move to suppress the evidence before trial and at no time during the trial did he request a hearing on the issue as to whether the papers and testimony relative thereto were inadmissible under the Fourth and Fourteenth Amendments. The issue was not raised in the motion for a directed verdict at the close of the state's case (Exhibit "A", p. 107), and all that was stated in the motion when renewed at the close of the trial was "that the evidence was illegally obtained," with no attempt to identify what evidence was being referred to (Exhibit "A", p. 124). In fact, these papers and a volume of evidence relating thereto was introduced and only at one point did trial counsel proffer a very feeble and unarticulate objection that there had "been no showing that this evidence was legally obtained" (Exhibit "A", p. 49).

Assuming for a moment that there was a search and seizure in the constitutional sense, we think there are at least two reasons why the petitioner is in no position to complain of the same.

In the first place, one can freely consent to a search of his person and, having done so, any search or taking of evidence pursuant to his consent is not unlawful and his constitutional rights are not violated, *State* v. *Post*, 255 Iowa 573, 582, 123 N.W.2d 11; cf. *Stoner* v. *California*, 376 U.S. 483. The trial transcript in the instant case reflects testimony that the petitioner was informed that the papers were wanted for evidence and "he said that would be all right, he would write some more the next day" (Exhibit "A" pp. 48-49). The petitioner subsequently denied that he gave anyone permission to take his papers, but he in no way stated or inferred that he was coerced or tricked into giving

them up. The trial record shows sufficient creditable evidence of petitioner's consent to the taking of his papers.

In the second place, in Iowa, as in other jurisdictions, it is incumbent upon the defendant to demonstrate that evidence has been illegally procured by a motion to suppress the evidence and the right to have the evidence suppressed can be waived where the trial court is not timely made aware of the constitutional objection, *State* v. *Shephard*, 255 Iowa 1218, 1222, 124 N.W.2d 172; *State* v *Dwinnells*, 146 N.W.2d 231, 234 (Iowa, 1966). In the instant case there was no motion to suppress filed prior to the trial and at no time during the trial did the defendant request a hearing or clearly let the trial court know that he felt the evidence inadmissible because of an illegal search or seizure. We think that predicated on the trial record he should not now be allowed to raise the search and seizure issue, cf. *Schmerber* v. *California*, 16 L. Ed. 2d 908, 916, note 9; but see *Henry* v. *Mississippi*, 379 U.S. 443.

Apart from any issue as to consent or waiver, there was no search and seizure in the constitutional sense and it was constitutionally permissible to use the papers for evidential handwriting purposes. Where one has been arrested for the commission of a public offense in Polk County, Iowa, upon booking the accused it is customary practice to inventory his personal effects and to retain the same in a custody locker for safekeeping. The inventorying policy is justifiably required for the safety of the prisoner and of law enforcement officers and by the need for efficient operation and administration of a jail. In this respect, the petitioner does not contend that the inventorying practice is constitutionally impermissible; his position is that things taken as the result of an inventory may not subsequently be used against the accused in connection with a criminal trial growing out of the charge for which he was

arrested. The judicial decisions and sound reasoning relative to this issue hold against the petitioner's contention. *Lanza* v. *New York*, 370 U.S. 139; *Ker* v. *California*, 374 U.S. 23; *Burge* v. *United States*, 342 F.2d 408 (C.A. 9); *State* v. *Stevens*, 26 Wis. 2d 451, 132 N.W.2d 502; *State* v. *Polton*, 143 N.W.2d 307 (Iowa, 1966); cf. *State* v. *Chinn*, 231 Or. 259, 373 P.2d 392.

Ker v. *California*, the facts of which we do not think it necessary to detail, is cited for the proposition that where police officers are acting within lawful authority and during the course of such activity are permitted to see that which was placed before them in full view, the discovery of such *does not constitute a search* and the thing so discovered can subsequently be used for evidential purposes (374 U.S. at 42-43). *Lanza* v. *New York*, teaches that prison administrative rule can to some extent interfere with one's right of privacy (370 U.S. at 143):

> "[T]o say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument."

And where an automobile has been impounded under statutory authorization upon probable cause to believe it to have been used in the sale and possession of narcotics, *Burge* v. *United States*, supra, rules that from the time of its seizure the accused lost the right to privacy thereto and could not complain as to the use in evidence of things subsequently found therein (372 F.2d at 414).

While these cases present a frame of reference from which one can get a glimpse of the principle we contend for, *State* v. *Stevens*, supra, places the problem in its proper perspective and we think its sound reasoning goes far to

dispose of the petitioner's search and seizure contention. Mary Perez Stevens was arrested in Kenosha for disorderly conduct, booked at the jail, and her property was removed prior to being placed in a cell. A peace officer made an inventory of her purse and the examination revealed material in the bottom of the same, the discovery of which resulted in a prosecution for theft through fraud. On appeal Miss Stevens contended that the use of material taken from her purse amounted to an illegal search and seizure. The Supreme Court of Wisconsin held to the contrary (132 N.W.2d at 506-507):

> "... We agree with the defendant this search was not incidental to the arrest but it does not follow the seizure of the contents of the purse was illegal.
>
> * * *
>
> "The examination of the defendant's purse at the police station was apparently made in accordance with a custom to inventory the personal effects kept for safekeeping by the police for one lawfully held in jail. Such an examination and inventorying of personal effects of a prisoner at the police station and not at the scene of arrest, and at some time remote from the arrest can hardly be justified under the traditional concept of being incidental to the arrest. In this case the legality of the seizure of the contents of the purse rests upon a custody search required for the safety of the prisoner and of law enforcement officers and by the efficient operation and administration of a jail.
>
> * * *
>
> "On almost identical facts, it was held seizure some days after the arrest of property of an accused kept by the police for one in jail was valid on the ground of being incidental to the arrest. Baskerville v. United States, (C.A. 10th, 1955) 227 F.2d 454. For greater reason, in custody examinations the material

or objects which are not looked for but are on the person must be held to be validly seized in the process of incarcerating or jailing the defendant. Such type of search is referred to in Charles v. United States, (C.A. 9th, 1960) 278 F.2d 386, 389, footnote 2. See also Varon, Searches, Seizures and Immunities, Vol. 1, p. 196 (1961), in which the author states that any incriminating evidence obtained by the police in a custody search may be validly seized and used as evidence against the accused either upon the charge for which the arrest was made or upon an additional charge occasioned by the evidence. See also 51 A.L.R. 431; 32 A.L.R. 685.

"Since the purse and other personal articles of the defendant were properly in the custody of the police for safekeeping, the police could seize what was in plain sight."

Though we believe what has been said above disposes of the petitioner's search and seizure contention, one further observation is in order. The petitioner in his brief (pp. 40-46) has felt it necessary to try to harmonize this Court's pronouncements on the so-called "mere evidence rule". Compare *Boyd* v. *United States*, 116 U.S. 616 with *Gouled* v. *United States*, 255 U.S. 298; and *Abel* v. *United States*, 362 U.S. 217. We feel no such compulsion to join in the task, because whatever the vitality of the mere evidence rule in the federal realm, that rule is not constitutionally binding on the states, cf. *Schmerber* v. *California*, 16 L. Ed. 908; Comment, 52 Iowa Law Review 344, 347-348. The taking of the blood sample in *Schmerber* and the testimony relative thereto can only be classified conceptually as mere evidence; not contraband, nor the instrumentality used to commit a crime or the fruits thereof.

It is, moreover, worth noting that several of the states, including Iowa, have, in well reasoned opinions, declined to follow the "mere evidence rule." *People* v. *Thayer*,

63 Cal. 2d 635, 408 P.2d 108 (opinion by Traynor, J.); *State* v. *Bisaccia*, 45 N.J. 504, 213 A.2d 185; *State* v. *Raymond*, 142 N.W.2d 444 (Iowa, 1966).

Compulsory Self-Incrimination

The petitioner also complains that in using the papers in issue the State compelled him to be a witness against himself. Since, as we have shown above, the papers lawfully came into the State's possession and the same could properly be used at the trial, the self-incrimination argument is, at the same time, both specious and spurious. Moreover, the trial record is void of any objection to the use of the papers by reasons of the Fifth Amendment and the contention is now precluded by *Schmerber* v. *California*, 16 L. Ed. 2d 908, 916, note 9. In keeping with the footnote referred to, the trial in this case was commenced on October 2, 1964, several months after this Court's ruling in *Malloy* v. *Hogan*, 378 U.S. 1.

Even if we assume that our argument as to the petitioner's search and seizure contention is not sound, the use of the papers did not compel the petitioner to be a witness against himself, *Schmerber* v. *California*, supra; *People* v. *Harper*, 115 Cal. App. 2d 776, 252 P.2d 950. Schmerber's blood had been withdrawn despite his refusal to freely give a sample, on the advice of counsel. Evidence relative to the alcoholic content of his blood at the time of his arrest was introduced at the trial over his due process objection based, in part, on the self-incrimination clause of the Fifth Amendment. In holding that the withdrawal of blood did not, under the circumstances of that case, amount to compulsory self-incrimination the Court stated (16 L. Ed. 2d at 916):

"It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, *to write or speak for identification*, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." (Emphasis added).

The petitioner draws on the language referring to *Boyd* v. *United States*, in the quote as establishing his point. In so doing he ignores the language we have italicized. If one can be made to "write . . . for identification" purposes we can fail to see any distinction between such compulsion and compelling one to give up something he has already written for identification purposes. Either case falls within the "real or physical evidence" category and does not violate the rule against self-incrimination.

In conjunction with our belief that we are not herein dealing with eliciting testimonial responses, may we call attention to McCormick on Evidence, Section 126, pages 263-65 (1954), wherein the author takes note of the view that the privilege protects only testimonial compulsion in the sense of giving testimony and of producing documents and other objects in court; and that in jurisdictions following this view the privilage is not violated when the accused is, inter alia, required to give a specimen of his

handwriting. The author observes, ". . . This view most nearly achieves the aim of holding the privilege within limits which will enable law enforcement officers to perform their tasks without unreasonable obstruction." Id. p. 265.

We submit that the following language in *People* v. *Harper*, 115 Cal. App. 2d 776, 779, 252 P.2d 950, 952, presents a persuasive rationale for viewing handwriting exemplars as outside the privilege against self-incrimination:

> ". . . Defendants rely upon the privilege against self-incrimination contained in the Constitution of California (art. I, §13) and in the Fifth Amendment to the Constitution of the United States. Defendants, however, do not come within the protection of those constitutional guaranties since they only protect a person from any unwilling testimonial disclosures, and do not preclude the introduction of physical evidence that a defendant is induced to provide, such as an examplar of his handwriting. The protection extends only to communications, oral or written, upon which reliance is placed as involving a defendant's consciousness of the facts and the operation of his mind in expressing them. There was no 'testimonial compulsion' here. Defendants were not required to verify the authenticity of their handwriting on the exemplars. This was provided by a witness who saw them fill out the exemplars. Defendants were not compelled to disclose that the writing on the betting markers was theirs. This was proved by a handwriting expert. There is here no reliance to be placed upon any statement made by either of the defendants. The evidence was their handwriting, a physical fact which was compared with the handwriting on the betting markers and found to be the same. . . ."

CONCLUSION

For all of the above reasons the State respectfully concedes that the petitioner is entitled to meaningful appeal with effective assistance of counsel and that the case should be remanded to the Iowa Court with directions to that end. In the event the Court finds it appropriate to immediately reach the petitioner's Fourth and Fifth Amendment contentions, the Court is requested to rule against the petitioner on the merits and enter judgment affirming the conviction.

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December, 1966

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APPENDIX A

(Statutory Provisions and Procedural Rules)

Section 793.17 of the 1962 Code of Iowa, relative to criminal appellate procedure, provided:

> "The record and case may be presented in the supreme court by printed abstracts, arguments, motions, and petitions for rehearing as provided by its rules; and the provisions of law in civil procedure relating to certification of the record and the filing of decisions and opinions of the supreme court shall apply in such cases."

Supreme Court Rules 15 and 16, 1962 Code of Iowa, Vol. 2, pp. 2715-2716, provided:

> "Court Rule 15. When an appeal is taken in a criminal case and the clerk's transcript of the record, required by section 793.6 of the Code, is filed with the clerk of this court, the cause shall be assigned for submission on such transcript, but the date set for such submission shall be not less than ninety days after the date the appeal was perfected as shown by such transcript.
>
> "Court Rule 16. If a defendant in a criminal case appeals and desires to submit the case upon a printed abstract of the record, brief and argument, he shall serve on the attorney general and file with the clerk of this court a notice to that effect, before the day set for the submission of the cause under the provisions of Rule 15. In that event, the appellant shall file the printed abstract of the record with the clerk of this court and serve a copy upon the attorney general within ninety days following the service and filing of the notice of appeal, unless, within such ninety days, additional time be granted by a judge of this court

after notice and an opportunity to be heard have been given to the attorney general, and the cause shall be reassigned for submission on a date at least ninety days subsequent to the filing of the printed abstract of the record. Appellant shall serve his brief and argument on the attorney general and file it with the clerk of this court within forty-five days after filing the abstract. The state shall have thirty days after the filing of appellant's brief within which to deny the abstract, serve and file amendment thereto and brief and argument. Appellant shall serve and file his reply brief within fifteen days after the state's brief is filed. A denial by the appellant of the state's additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record."

APPENDIX B

TO: THE SUPREME COURT OF IOWA

FROM: THE ATTORNEY GENERAL OF IOWA

RE: PROPOSED RULE CHANGES

In recent years the United States Supreme Court has ruled in a number of cases that convicted indigent defendants desiring appellate review of criminal judgments are entitled to adequate and effective review despite poverty. Many of these cases have made it clear that such review can only be obtained by furnishing the appellate court with a transcript of the trial proceedings or its equivalent and six members of the High Court have held that a state must furnish an indigent with counsel to assist with the appeal. This Court has recently stated that to "afford an indigent defendant an adequate appeal from his conviction, the furnishing of a transcript, printed record and necesary briefs is required," *Weaver* v. *Herrick* 140 N.W. 2d 178, 181 (Iowa, 1966).

The Iowa provisions relative to criminal appellate procedure are such that in the usual case the requirements of *Weaver* v. *Herrick* are satisfied. We are, however, familiar with some cases where an indigent defendant desired plenary review of his conviction but counsel appointed to assist him, without either the knowledge or the consent of the indigent or this Court, failed to file a printed record and a brief with the result that the conviction was affirmed on the clerk's transcript. The clerk's transcript appeal is not meaningful review of the proceedings culminating in the conviction within the meaning of *Weaver* v. *Herrick* or the many United States Supreme Court decisions on the subject.

There are, of course, some convicted defendants who have resorted to a clerk's transcript appeal to obtain time to place their affairs in order; others have desired a full appeal, believed they were receiving the same, but obtained review only on a clerk's transcript. As to this latter class there is a very serious argument that they have been deprived of their constitutional right to have full and effective appellate review. Accordingly, we are submitting two proposed rule changes which we believe would remedy this problem. We respectfully request the Court to give consideration to these proposed changes.

Lawrence F. Scalise
Attorney General
Des Moines, Iowa
By /s/ Don R. Bennett
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Proposed Rule 15

If a defendant in a criminal case appeals and desires to submit the case upon a printed abstract of the record, brief and argument, he shall serve on the attorney general and file with the clerk of this court a notice to that effect within thirty days following the service and filing of the notice of appeal. In that event, the appellant shall file the printed abstract of the record with the clerk of this court and serve a copy upon the attorney general within ninety days following the service and filing of the notice of appeal, unless, within such ninety days, additional time be granted by a judge of this court after notice and an opportunity to be heard have been given to the attorney general, and the cause shall be reassigned for submission on a date at least ninety days subsequent to the filing of the printed abstract of the record. Appellant shall serve his brief and argument on the attorney general and file it with the clerk of this court within forty-five days after filing the abstract. The state shall have thirty days after the filing of appellant's brief within which to deny the abstract, serve and file amendment thereto and brief and argument. Appellant shall serve and file his reply brief within fifteen days after the state's brief is filed. A denial by the appellant of the state's additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record.

If the printed abstract is not filed within ninety days following the service and filing of the notice of appeal, or within any period of additional time granted in the manner described above, the Court shall on its own motion dismiss the appeal with prejudice. Counsel appointed to represent an indigent defendant should take note of Supreme Court Rule 16 and abide by the provisions set forth therein.

Proposed Rule 16

Section 610.11 of the Code provides that upon being admitted to the bar an attorney shall take an oath or affirmation to faithfully discharge the duties of an attorney and counselor to the best of his ability. In keeping with such oath, an attorney appointed to represent a convicted indigent desiring an appeal is expected to satisfy the requirements of Supreme Court Rule 15 relative to the filing of a printed abstract and brief and argument. Under no circumstances should court appointed counsel, without the knowledge or consent of the defendant, fail to file the necessary record and brief and argument.

Where counsel has been appointed to represent an indigent defendant desiring an appeal, the Court would be greatly aided if appointed counsel remains in the case and it does not favor a request to withdraw from the appeal. If, however, counsel is convinced after conscientious investigation of the trial transcript that the appeal is frivolous and that he cannot, in good conscience, proceed with the appeal he may seek leave from the appropriate trial court to withdraw. Prior to any request to withdraw from an appeal, appointed counsel should advise his client of the decision as to frivolity. If upon being so advised the defendant agrees with counsel's decision and desires to proceed no further with the appeal, such desire clearly and expressly communicated to this Court in writing shall result in the appeal being dismissed.

In the event the defendant desires to proceed with the appeal, appointed counsel may make application to the appropriate trial court to be permitted to withdraw from the case. If the trial court refuses to honor such request, counsel should file a printed record and a brief informing

the Court of the points his client urges and otherwise see that the case is reviewed in accordance with the rules relative to criminal appeals. Where counsel is permitted to withdraw and the defendant desires to proceed with the appeal, upon the request of the convicted indigent further counsel should be secured by the trial court to assist with the appeal.

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